PUBLIC PROSECUTOR

v.

NG HOCK LAI

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS J.
[CRIMINAL APPEAL NO. 41-117-94]
5 NOVEMBER 1994

CRIMINAL PROCEDURE : Conviction and sentence under s. 15(a) Dangerous Drugs Act 1952 - Learned Magistrate failing to make supervision order for specified period as required by s. 38B DDA 1952 - Appeal by DPP - Request for ruling on interpretation of s. 38B - Whether it is obligatory on the part of the Magistrate to make the supervision order.

INTERPRETATION OF STATUTES : Dangerous Drugs Act 1952, s. 38B - Conflict between subsection (1) and subsection (2) of s. 38B - How to be resolved - Correct test to be applied.

The respondent was convicted of an offence under s. 15(a) of the Dangerous Drugs Act 1952 (DDA 1952) and sentenced to imprisonment for a period of one year. The DPP appealed against the sentence on the ground that the learned Magistrate had erred in law by failing to make an order that the respondent undergo supervision for a specified period as required by s. 38B of the DDA 1952.

The Court was called upon to make a ruling on the interpretation of s. 38B, in particular whether or not a Magistrate, after convicting and sentencing an accused person, must make a supervision order.

Held:

[1] Upon reading s. 38B of the DDA 1952 together with s. 6 of the Drug Dependents (Treatment and Rehabilitation) Act 1983 (DDA 1983), it is the intention of the former provision that the Magistrate concerned must make a supervision order after convicting and sentencing the accused person. This means that, unlike a normal order made under s. 6(1)(b) of the DDA 1983 where the making of the order is a matter of discretion for the Magistrate, the making of an order pursuant to s. 38B is mandatory. The Magistrate has no discretion not to impose the order.

[2] There is a conflict between subsection (1) and subsection (2) of s. 38B. The former appears to say that whilst the supervision order is made by the Magistrate, the period of the order is determined by the Rehabilitation Officer. However going by s. 38B(2) of the DDA 1952 (read together with s. 6(2) of the DDA 1983), it would appear that such a period is determined by the Magistrate making the order.

[3] Where there is an irreconcilable conflict between two subsections within the same section, the correct test to be applied is to determine which is the leading provision and which is the subordinate provision. The statute will be interpreted so as to give effect to the leading provision. In this case, it is quite clear, from the scheme of s. 38B, that subsection (2) of that section is the leading provision. It follows therefore that the period of supervision is determined by the Magistrate making the order.

[4] Although there is no form specifically provided for an order made pursuant to s. 38B DDA 1952, in view of the words "...and the provisions of that Act shall apply accordingly in relation to such supervision." in subsection (2) of s. 38B, it would appear to be the intention of s. 38B that the Magistrate making the order, among other things, ought to use the same form as is used for an order made under s. 6(1)(b) of the DDA 1983, but with the necessary modifications made to the form to reflect the true nature of the order.

[5] Although the making of the order under s. 38B of the DDA 1952 is mandatory, since s. 38B(2) stipulates that the provisions of the DDA 1983 shall apply to the supervision, it would still be obligatory on the part of the Magistrate to give the person concerned the opportunity to make representations before the order is made.

[Appeal allowed. Respondent ordered to be produced before the Magistrates' Court to enable the Magistrate to impose the supervision order as required by s. 38B DDA 1952].

Cases referred to:
Re Marr and another (bankrupts) [1990] 2 All ER 880 ***(refd)***
Institute of Patent Agents v. Lockwood [1894] AC 347, HL, p.360 ***(refd)***
*Wood v. Riley [1867] LR 3 CP 26, p. 27****(refd)***

Legislation referred to:
Dangerous Drugs Act, 1952 ss. 15(a), 38B
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 2, 6
Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983, Forms 4 & 5

For the public prosecutor - S. Selavanathan, DPP
Respondent in person

JUDGMENT

Mohd Hishamudin bin Mohd Yunus J:
In this appeal, the respondent had been convicted by the Magistrate's Court, Langkawi, of an offence under s. 15(a) of the Dangerous Drugs Act, 1952 (the "DDA 1952") and sentenced to imprisonment for a period of one year. The Deputy Public Prosecutor appeals against the sentence on the ground that the learned Magistrate had erred in law by failing to make an order that the respondent undergo supervision for a specified period as required by s. 38B of the DDA 1952.

Section 38B provides:

> 38B. Powers of Court in respect of person found guilty under s. 15
>
> (1) Where a person is found guilty of an offence under s. 15, he shall immediately after having undergone the punishment imposed upon him in respect thereof, undergo supervision by a rehabilitation officer as defined under subsection (2) of section 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 for a period of not less than two and not more than three years as may be determined by the rehabilitation officer.
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> (2) A person who is required to undergo supervision by a rehabilitation officer under subsection (1), shall be deemed to have been placed under supervision by virtue of an order made by a Magistrate under paragraph (b) of subsection (1) of s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983, and the provisions of that Act shall apply accordingly in relation to such supervision.

I have been requested by the learned DPP to make a ruling on the interpretation of the above section because of the obscurity of that provision. He submits that in view of the obscurity coupled with the fact that in several cases the Magistrate concerned had omitted to make a supervision order, some Magistrates might be of the view that the provision does not require the order of a Magistrate in order for the convicted person to undergo the supervision. In other words, for an accused person, once convicted and punished, he must automatically undergo the supervision: no order of a Magistrate is necessary.

He further submits that to adopt such an interpretation, including the interpretation that the period of supervision is determined by the rehabilitation officer, would lead to practical difficulties.

At the outset, with humility and with due respect to the parliamentary draftsmen, I must say here that I am not happy with the wording of s. 38B. The subsections are both confusing and conflicting. The whole section needs to be reviewed and redrafted. This matter needs urgent attention; for I believe Magistrates convict and sentence offenders of s. 15 of the DDA 1952 often. I hope the learned DPP would promptly refer this matter to the Attorney General's Department.

Be that as it may, my view is that, upon reading s. 38B of the DDA 1952 together with s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("DDA 1983"), it is the intention of the former provision that the Magistrate concerned **must make** a supervision order after convicting and sentencing the accused person. Note that I use the word "must". This means that, unlike a normal order made under s. 6 (1) (b) of the DDA 1983 where the making of the order is a matter of discretion for the Magistrate (because of the word "he may order"), the making of an order pursuant to s. 38B is mandatory: the Magistrate has no discretion not to impose the order.

However, there are still some difficulties. First, who determines the period of supervision (which shall be not less than two and not more than three years)? Going by s. 38B (1), it would appear that, whilst the supervision order is made by the Magistrate, the period of the order is determined by the rehabilitation officer - a rather awkward situation, I must say! But going by s. 38B (2) of the DDA 1952 (read together with s. 6(2) of the DDA 1983), it would appear that such a period is determined by the Magistrate making the order. So, there is a conflict between subsection (1) and subsection (2) of s. 38B. How should this conflict be resolved? The principle is that, if there is an irreconcilable conflict between two subsections within the same section, the correct test to be applied is to determine which is the leading provision and which is the subordinate provision. The statute will be interpreted so as to give effect to the leading provision. The principle of interpretation (if it ever existed) that the provision occurring later in the statute prevails over that occurring earlier is long obsolete (*Re Marr and another (bankrupts)* [1990] 2 All ER 880, CA, per Nocholls LJ at P.886, applying a *dictum* of Lord Herschell LC in *Institute of Patent Agents v. Lockwood* [1894] AC 347, HL, at p.360 and disapproving a *dictum* in *Wood v. Riley* [1867] LR 3 CP 26 at p. 27). However, be that as it may, in my judgment, it is quite clear that, from the scheme of the s. 38B, subsection (2) of that section appears to be the leading provision. It follows therefore that the period of supervision is determined by the Magistrate making the order.

The other difficulty is that whilst for the purpose of a normal order made under s. 6(1)(b) of the DDA 1983 there is a form (Form 4) provided for in the Schedule to the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules, 1983, there is no form specifically provided for an order made pursuant to section 38B of the DDA 1952. However, in view of the words "....and the provisions of that Act shall apply accordingly in relation to such supervision." in subsection (2) of s. 38B, it would appear to be the intention of the section (s. 38B) that the Magistrate making the order, among other things, ought to use the same form (Form 4) but with the necessary modifications made to the form to reflect the true nature of the order. The modifications to be made must, among other things, reflect the fact:

(a) that the making of the supervision order is mandatory;

(b) that the order is made under s. 6(1)(b) of the DDA 1983 in conjunction with s. 38B of the DDA 1952;

(c) that the person concerned has been found guilty by the Court of an offence under s. 15 of the DDA 1952 and has been sentenced accordingly; and

(d) that the supervision order is to take effect immediately after the person has undergone the punishment imposed upon him.

To a lesser extent, necessary modifications also have to be made to Form 5 (pertaining to the bond) of the 1983 Rules.

Finally, to avoid any misunderstanding, it must be reiterated here that since s. 38B(2) stipulates that the provisions of the DDA 1983 shall apply to the supervision, therefore, although the making of the order is mandatory, it would still be obligatory on the part of the Magistrate to give the person concerned the opportunity to make representations before the order is made.

Accordingly, I allow the appeal by the Deputy Public Prosecutor. The respondent is to be produced before the Magistrates' Court at Langkawi on 20 November 1994 to enable the Magistrate to impose the supervision order as required by s. 38B.